IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	**Case No. 98-40631**
BLAIR and RONDA JEAN CHASE, d/b/a Chase Dairy,	)	
	)	
Debtors.	)	
_____	)	
	)	
FORREST HYMAS, Trustee,	)	
	)	**Adv. No. 99-6016**
Plaintiff,	)	
	)	**MEMORANDUM OF DECISION RE DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS**
vs.	)	
	)	
AMERICAN GENERAL FINANCE, INC., AMERICAN GENERAL FINANCE CO., and AMERICAN GENERAL FINANCE,	)	
	)	
Defendants.	)	
_____	)	

Craig Christensen, Pocatello, Idaho, for Plaintiff.

Charles Johnson, Pocatello, Idaho, for Defendants.

I. Background

In this adversary proceeding, Plaintiff Forrest Hymas, the Chapter 12 Trustee, seeks to avoid certain transfers made prior to bankruptcy by Debtors

Blair and Ronda Chase to Defendant American General Finance under Sections 544, 547, and 549 of the Bankruptcy Code.[1] Defendant moved for entry of a judgment in its favor on the pleadings. Following a hearing on Defendant's motion held March 7, 2000, the matter was taken under advisement.

II. Facts

From the record, the Court assumes the following are the undisputed facts.

Debtors borrowed money on several occasions from Defendant American General Finance.

On October 27, 1994, Debtors signed a promissory note in favor of Defendant in the amount of $137,610.75. This note ("Note 1"), was secured by a mortgage ("Mortgage 1") encumbering two parcels of property in Jefferson County, an eighty acre tract referred to herein as "Section 26," and a six acre parcel, on which a dairy was located, referred to as "Section 24." The mortgage was also executed and recorded on October 27, 1994.

---

[1] The Debtors' confirmed Chapter 12 plan provides that the Chapter 12 Trustee shall pursue this avoidance action on behalf of the creditors in this case. *Hall v. Sunshine Mining Company (In re Sunshine Precious Metals, Inc.)*, 157 B.R. 159, 164 (Bankr. D. Idaho 1993) (Chapter 11 plan designated debtor in possession as entity to bring all fraudulent transfer actions).

On September 7, 1995, Debtors executed another note ("Note 2") in favor of Defendant for $29,733. Note 2 was secured by another mortgage ("Mortgage 2") on the same real property, Section 26 and Section 24. Mortgage 2 was executed on September 14, and recorded on September 20, 1995.

On April 1, 1998, Debtors executed yet a third note ("Note 3") in favor of Defendant for $163,282.88. The loan proceeds represented by Note 3 were used by Debtors, at least in large part, to satisfy the outstanding balances on Note 1 and Note 2.[2] To secure Note 3, Debtors signed a trust deed ("Deed of Trust") for Defendant's benefit. Debtors and Defendant evidently intended the Deed of Trust to encumber the same two parcels of property that secured Note 1 and Note 2, Section 26 and Section 24. However, in an exhibit attached to both Note 3 and the Deed of Trust, Section 26 was erroneously described.[3] The Deed of Trust was recorded on April 6, 1998.

---

[2] It appears from the face of the promissory note that all the loan proceeds except $1,000 and the amounts needed to pay recording fees were disbursed to Defendant. In addition, Notes 1 and 2 were stamped "Paid By Renewal April 1, 1998."

[3] Defendant alleges it was not responsible, and therefore should not be prejudiced by, the error made in the legal descriptions. Both the Deed of Trust and Mortgage 3 were evidently prepared by a local title company. Under these circumstances, the Court respectfully disagrees. At best, on this record, it appears the title company was acting on Defendant's behalf. Any problems with the title officer's performance must therefore be addressed by the title company.

On May 18, 1998, Debtors executed a mortgage ("Mortgage 3") to secure the Note 3 obligation. Again, in Mortgage 3 Section 26 was incorrectly described. Mortgage 3 was not recorded until June 3, 1998.[4] In the meantime, though, on May 26, 1998, Debtors filed a petition for relief under Chapter 12 of the Bankruptcy Code.

On June 10, 1998, Defendant executed two separate documents entitled "Satisfaction of Mortgage" relating to Mortgage 1 and Mortgage 2, the mortgages securing Note 1 and Note 2. Each satisfaction recites that the indebtedness secured by the mortgages has been "fully paid, satisfied and discharged . . . ." These documents were filed for record on June 16, 1998.

On July 10, 1998, Defendant executed a document entitled "Deed of Reconveyance" which indicates it was executed by the title company, as the trustee under the Deed of Trust, "pursuant to the written request of the beneficiary . . . ." This Deed of Reconveyance purports to grant and reconvey the property described in the Deed of Trust "unto the parties entitles [sic] thereto." This document was recorded on July 21, 1998.

---

[4] Defendant alleges Mortgage 3 was executed at the suggestion of a title company officer who became concerned over the validity of the Deed of Trust. Defendant also alleges the delay in recording Mortgage 3 resulted because the title officer was preoccupied with a sick relative. Contrary to Defendant's arguments, even if these factual allegations are shown to be true, they do not impact the Court's decision regarding the issues raised by this motion.

Plaintiff is the Chapter 12 Trustee is Debtors' bankruptcy case. Debtors' Chapter 12 was confirmed on February 23, 1999. This action was commenced by Plaintiff on January 28, 1999.

III. Applicable Law

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . ." Fed. R. Civ. P. 12(c) as incorporated by Fed R. Bankr. P. 7012(b). Here, both parties have asked the Court to consider matters outside the pleadings. Therefore, Defendant's motion is properly treated as a motion for summary judgment under Rule 56. *See* Fed. R. Civ. P. 56, made applicable in adversary proceedings by Fed. R. Bankr. P. 7056. Summary judgment is appropriate if, after viewing the evidence in the light most favorable to the non-moving party, there exists no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *State Farm Mutual Automobile Insurance Company v. Davis*, 7 F.3d 180, 182 (9th Cir. 1993).

IV. Discussion

A. The Releases

In its motion, Defendant asks the Court to hold that its mortgage liens on Debtors' property are valid and not avoidable by a bankruptcy trustee. In responding to Defendants' motion, one argument advanced by Plaintiff in this action is that, under these facts, Defendant effectively released its lien rights in Debtors' property granted by Mortgage 1, Mortgage 2 and the Deed of Trust. It is undisputed that Defendant executed and recorded a satisfaction with respect to Mortgage 1 and Mortgage 2 and a Deed of Reconveyance as to the Deed of Trust. However, Defendant claims these releases are ineffective and void by virtue of the automatic stay provisions of Section 362 of the Bankruptcy Code because Defendant took these steps only after Debtors filed their bankruptcy petition. *See Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 571 (9th Cir. 1992) (acts in violation of the automatic stay are void, not merely voidable). The Court disagrees.

It is correct that "[any act to create, perfect, or enforce any lien against property of the estate" is prohibited by the automatic stay. 11 U.S.C. § 362(a)(4). The statutes do not, however, prohibit acts by creditors taken to release a lien previously held against property of the bankruptcy estate or to

convey property to a debtor that would be included in the bankruptcy estate. Generally, the automatic stay serves only to protect a debtor, the debtor's property, or property of the bankruptcy estate. *Kedgwick Timber Corp. v. Northern Stevedoring & Handling Corp. (In re Kedgwick Timber Corp.),* 23 F.3d 241, 246 (9th Cir. 1994). By contrast, to allow Defendant to invoke the stay to invalidate the release of the mortgages and the reconveyance would provide no protection for the debtor, the debtor's property, or property of the debtor's bankruptcy estate. Defendant cannot argue its actions should be considered void when those actions did not violate the stay provisions and when the results of its argument would prejudice, not benefit, the bankruptcy estate and its creditors.

The Court will not declare the satisfactions and Deed of Reconveyance void as a matter of law. Defendant is not entitled to judgment on this issue. On the other hand, it also would be inappropriate at this stage of the case for the Court to conclude that the liens were effectively released. Whether Defendant intended to release Mortgage 1, Mortgage 2, and the Deed of Trust when it executed the Satisfaction of Mortgages on June 10, 1998, and the Deed of Reconveyance on August 21, 1998, present questions of fact for trial.

Defendant also asserts the releases should be avoided under Section 549 of the Code as postpetition transfers. Once again Defendant is on the wrong side of the argument. Generally, only a trustee is entitled to exercise the avoidance powers granted in Section 549 for the benefit of the creditors of the bankruptcy estate. *City of Farmers Branch v. Pointer (In re Pointer)*, 952 F.2d 82, 87-88 (5th Cir. 1992). The Ninth Circuit has relaxed the general rule under limited circumstances not present here. *In re Parmetex, Inc.*, 199 F.3d 1029, 1030 (9th Cir. 1999) (creditor allowed to pursue claim under Section 549 where trustee and creditor stipulated to such and bankruptcy court approved the stipulation). Under these facts, Defendant lacks legal standing to assert any claims under Section 549.[5]

B. Validity of the Deed of Trust

Plaintiff contends the Deed of Trust is ineffective under state law, and therefore not enforceable against a trustee. Defendant argues that, as a matter of law, the Deed of Trust is valid. On this point, Defendant prevails.

---

[5] Even if Defendant had standing to assert such power, Section 549 may only be used to avoid unauthorized transfers of property of the bankruptcy estate to others. 11 U.S.C. § 549(a). In this case, Defendant's execution and recording of the satisfactions or Deed of Reconveyance did not effect a transfer of any property of the bankruptcy estate from Debtors to any third party.

The Idaho Code defines a deed of trust as "a deed . . . conveying real property to a trustee in trust to secure the performance of an obligation of the grantor or other person named in the deed to a beneficiary." Idaho Code § 45-1502(3). State law then defines the term "real property" for purposes of the deed of trust statute to include only that "located within an incorporated city or property, regardless of its location, not exceeding forty (40) acres." Idaho Code § 45-1502(5). Here, it is undisputed that Section 26 described in the Deed of Trust is not located within an incorporated city, and the parcel exceeds forty acres in size. However, under the statutes, if the trust deed recites that the property described complies with the acreage requirement, such statement is conclusive with respect to compliance with the statute. *Id.*; *see also Bear Lake West, Inc. v. Stock (In re Bear Lake West)*, 84 I.B.C.R. 15, 16-17 (Bankr. D. Idaho 1984). The Deed of Trust contains a provision stating that the property "contain[s] not more than twenty acres." Trustee's Supplemental Record, Exhibit G. Therefore, the Deed of Trust complies with the statutory requirements and may not be avoided on this ground.

Even had the Deed of Trust not recited that the property conveyed contained less than forty acres as required by the statutes, this defect would not render the instrument ineffective to create a lien. While the beneficiary would

likely lose the right to foreclose the deed of trust by private sale, the instrument would be treated as a mortgage subject to judicial foreclosure. *Bear Lake West,* 84 I.B.C.R. at 17-18.

C. Section 544

Section 544 of the Bankruptcy Code grants a trustee what are sometimes called "strong arm" powers, one of which bestows upon a trustee the status of a bona fide purchaser ("bfp") of real property as of the commencement of the bankruptcy case. 11 U.S.C. § 544(a)(3);[6] *Briggs v. Kent (In re Professional Investment Properties of America*, 955 F.2d 623, 627 (9th Cir. 1992); *Decker v. J. Cyril Johnson Corporation Profit Sharing Plan (In re Harvey)*, 222 B.R. 888, 892-93 (9th Cir. B.A.P. 1998). If a transfer of an interest in the debtor's property could be avoided by a bfp of the property on the date the bankruptcy case is commenced, the transfer may also be avoided by the trustee.

---

[6]Section 544 provides in relevant part:

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--

. . .

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

A trustee's rights as a hypothetical bfp under Section 544 are defined by Idaho law "under the particular facts as of the date of the order for relief." *Fitzgerald v. Transamerica Financial Services (In re Mingo)*, 96.3 I.B.C.R. 112, 114 (Bankr. D. Idaho 1996).

Plaintiff asserts the transfers of the liens to Defendant could be avoided under the strong arm powers because Defendant did not properly disclose the actual name of its company in the notes, trust deed, and mortgages executed by the Debtors. Specifically, Plaintiff points to the promissory notes, wherein Defendant is referred to as "American General Finance Inc. (a subsidiary of American General Corporation)"; to the mortgages, where Defendant employs the name "American General Finance Co."; and to the Deed of Trust, in which Defendant is called "American General Finance." Plaintiff insists that by using different names in the notes, mortgages, and trust deed, the documents are seriously misleading and, because Defendant's proper legal name is not used, others searching the public record would not find the mortgages or deed of trust. Therefore, Plaintiff argues, the liens granted to Defendant are not enforceable.

Under the Uniform Commercial Code (U.C.C.), a financing statement is recorded by a secured creditor to give third parties notice of its

interest in a debtor's assets. One of the requirements for an effective financing statement is that it include the name of the creditor to which a third party may direct inquiries about the creditors' rights. Idaho Code § 28-9-402. Under the U.C.C., "[a] financing statement substantially complying with the requirements of [Section 28-9-402(9)] is effective even though it contains minor errors which are not seriously misleading." Idaho Code § 28-9-402(8). This provision was intended to guard against the "fanatical and impossibly refined reading of such statutory requirements [for financing statements] in which some courts have occasionally indulged" to allow for minor errors. Official Comment 9, Idaho Code § 28-9-402(8).

The U.C.C. does not apply to perfection requirements for Defendant's real estate mortgages. Idaho Code § 28-9-102. However, like the requirements for recording financing statements to notify others of the existence of a security interest in personal property, Idaho's real estate recording acts require that instruments creating an interest in land be recorded to give a similar kind of notice to the public. Idaho Code § 55-801; *Large v. Cafferty Realty, Inc.*, 851 P.2d 972, 975-76 (Idaho 1993) (purpose of the recording statutes is to provide notice to others that an interest is claimed in real property). Similar to Section 28-9-402(8), if errors or omissions are made in the recording of an

interest in real property, the recording may be serious misleading and may not provide the notice intended.

While the precise moniker used in the documents by Defendant varied, in each instrument Defendant's name included, at least, "American General Finance." This similarity in names is sufficient to alert others that American General Finance, whatever its formal name, claimed some interest in Debtors' land. Moreover, the difference in the names used in the notes, mortgages and deed of trust is not significant because, unlike U.C.C. financing statements, real estate records are organized in the county recorders' offices, and searched by others, by tract. Idaho Code § 55-808. Under these facts, the Court is confident a potential purchaser of the property covered by the mortgage or deed of trust would locate the documents in the public record if a proper search were made. In this context, the use in the documents by Defendant of the term "Co." as opposed to "Inc." is not seriously misleading and is a minor error or omission, and the Court will not endorse avoidance on this ground.

Plaintiff next points to the error in the legal description of the property in Mortgage 3 and the Deed of Trust as a basis for avoiding their legal effect. In the mortgages securing Note 1 and Note 2, the descriptions are correct. However, in the Deed of Trust and Mortgage 3, the parcel of property

earlier described as Section 26 is described as Section 24. The result is that both parcels of property evidently intended by the parties as security for Note 3 are described as Section 24. While the description for Section 24 is correct, an issue arises concerning the impact the erroneous description has on Defendant's interest in Section 26. The problem with the land descriptions is a serious one.

Under Idaho law, an unrecorded conveyance[7] of real property is void against subsequent purchasers of the property where the subsequent bona fide purchaser takes the property in good faith, for valuable consideration, without actual or constructive notice that an unrecorded interest exists, and records her interest. Idaho Code § 55-812; *Farm Bureau Finance Company, Inc. v. Carney*, 100 Idaho 745, 747, 605 P.2d 509, 511 (1980). However, "a party cannot blindly rely upon the record if there is other information available which would 'excite the attention of a man of ordinary prudence and prompt him to further inquiry.'" *Young v. Washington Federal Savings & Loan Association*

---

[7] The term "conveyance" includes every instrument in writing whereby an interest in real property is created, mortgaged, or encumbered in which the title to the property may be affected. A mortgage or deed of trust fits under this definition. Idaho Code § 55-811; *Young v. Washington Federal Savings & Loan Association (In re Young)*, 156 B.R. 282, 285 (Bankr. D. Idaho 1993) (quoting *Haugh v. Smelick*, 126 Idaho 481, 483 n.4 (1993)).

(In re Young), 156 B.R. 282, 285 (Bankr. D. Idaho 1993) (quoting *Farrell v. Brown*, 111 Idaho 1027, 1033 (Ct. App. 1986)).

Here, Defendant recorded the Deed of Trust on April 6, 1998, with an exhibit erroneously describing Section 26 as Section 24. Plaintiff is charged with constructive notice of Defendant's interest as disclosed by the recorded Deed of Trust. While that instrument correctly described Section 24, and is clearly a valid recorded conveyance as to that parcel, whether the erroneous description of Section 26 is sufficient to provide constructive notice to Plaintiff in his bfp status is doubtful.

Under Idaho law, a real property description "must be sufficiently certain to inform a purchaser as to the identity of the property at issue." *Fitzgerald v. Transamerica Financial Services (In re Mingo)*, 96.3 I.B.C.R. 112, 115 (Bankr. D. Idaho 1996). In *Mingo*, this Court found a legal description erroneously describing "Section 2" as "Section 7" did not prevent the trustee, as a hypothetical bfp, from avoiding the lien under Section 544(a)(3).

The situation here is not significantly different. In Mortgage 3 and the Deed of Trust, Section 26 is erroneously described as Section 24. There is no other reference to Section 26 in the Deed of Trust that would serve to prompt a potential purchaser of that property to further inquire as to the adequacy of the

description. Contrary to Defendant's arguments, this Court is unwilling to impose a duty on a purchaser or trustee to contact a lender and to verify the accuracy of the information contained in a recorded mortgage. While Plaintiff is charged with notice of everything in the recorded Deed of Trust as of the date of bankruptcy,[8] Plaintiff is not accountable to detect and investigate errors such Defendant's use of the wrong section number in a land description. *See Bob Cooper Inc. v. City of Venice (In re Bob Cooper, Inc.)*, 65 B.R. 609, 613 (Bankr. M.D. Fla. 1986) (a trustee is charged with only such notice as appears on the public record). Because the legal description is inadequate, Plaintiff may avoid Defendant's lien interest granted under Mortgage 3 and the Deed of Trust as to Section 26 as a matter of law. Defendant's interest in Section 24 is adequately described in the documents, however, and may not be avoided on this ground by Plaintiff under Section 544(a)(3).

---

[8] Admittedly, Mortgage 1 and Mortgage 2, which correctly described both parcels, were still of record and had not been released on the date of bankruptcy. However, by their terms, these mortgages secured only Note 1 and Note 2 respectively, and were not intended to secure amounts due under Note 3. Mortgage 3 and the Deed of Trust secure only Note 3. Under these facts, even though a search of the county tract index for the Section 26 property would turn up the prior mortgages, no information contained in Mortgage 1 or Mortgage 2 would put a potential purchaser on notice that Mortgage 3 or the Deed of Trust may contain an error in the legal description, or that Section 26 was intended as security for amounts due under Note 3.

Finally, under Section 544(a)(3), Plaintiff is empowered to avoid transfers of Debtors' real property otherwise voidable by a subsequent bona fide purchaser under applicable nonbankruptcy law, including unrecorded mortgages. *Michael v. Martinson (In re Michael)*, 49 F.3d 499, 501 (9th Cir. 1995); *see also* Idaho Code § 55-812. Mortgage 3 was executed by Debtors on May 18 but not recorded until June 3, several days after Debtors filed their bankruptcy petition. At the commencement of the bankruptcy case, Defendant's interest in Debtors' real property under Mortgage 3 was not enforceable against a bfp under Idaho Code § 55-812. Plaintiff assumes the role of the hypothetical bfp on the date of the bankruptcy petition and therefore has the power to avoid any interest created by Mortgage 3 under Section 544(a)(3).

D. Section 547

Plaintiff also seeks to avoid Defendants' lien on both parcels created by the Deed of Trust and Mortgage 3 as preferences under Section 547(b) of the Bankruptcy Code. Plaintiff, as trustee, has the burden of proving all the elements of an avoidable transfer. 11 U.S.C. § 547(g). Section 547(b) provides that a transfer of an interest in property of the debtor may be avoided if the transfer was: (1) made to or for the benefit of the creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was

made; (3) made while the debtor was insolvent; (4) within 90 days before the date of the filing of the petition; and (5) enabled the creditor to receive more than the creditor would have received in a chapter 7 case if the transfer had not been made. 11 U.S.C. § 547(b)(1)-(5).

1. Transfer for the Benefit of Defendant within 90 days of Bankruptcy

The starting point of any preference analysis is to identify whether a "transfer" of Debtors' property has been made. A transfer is defined broadly by the Code to include "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest . . . ." 11 U.S.C. § 101(54). Federal law governs what constitutes a transfer and when such transfer is complete. *Barnhill v. Johnson*, 503 U.S. 393, 397 (1992). Clearly, the Deed of Trust and Mortgage 3, and the conveyance of the interests in Debtors' property to Defendant effected by those instruments, qualify as transfers for purposes of Section 547(b).[9]

---

[9] Debtor argues since it already held outstanding mortgages on Debtors' property (i.e., Mortgage 1 and Mortgage 2) that it received nothing new or additional via Debtors' execution of the Deed of Trust or Mortgage 3. Therefore, Defendant suggests, no "transfer" occurred. This argument is disingenuous unless Defendant also concedes, which it does not, that the Deed of Trust and Mortgage 3 were ineffective to grant Defendant a lien on Debtors' property. The argument also ignores the fact that the April 1 loan proceeds were used to "pay" Note 1 and Note 2, the debts secured by

Transfers were made to Defendant under Mortgage 3 and the Deed of Trust, but on what date did those transfers occur for preference purposes? A transfer of an interest in real property under the preference law is considered made at the time the "transfer takes effect between the transferor and the transferee . . ." if perfection occurs within ten days of the transfer. 11 U.S.C. § 547(e)(2)(A). Otherwise, the transfer is deemed made upon the date of perfection. 11 U.S.C. § 547(e)(2)(B). A transfer of an interest in real property is "perfected" for preference purposes "when a bona fide purchaser of such [real] property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee." 11 U.S.C. § 547(e)(1)(A). Under Idaho law, a transfer of an interest in real property is perfected as against a bona fide purchaser of that property when the instrument of conveyance is properly recorded. Idaho Code § 55-812.

Here, the Deed of Trust was executed (and therefore effective as between Debtors and Defendant) on April 1, 1998. It was recorded on April 6, within the ten day period prescribed by Section 547(e)(2)(A). Since the transfer was deemed made on April 1, 1998, and Debtors filed their Chapter 12 petition

---

Mortgages 1 and 2, a fact substantiated by Defendant's later execution and recording of the two satisfactions.

on May 26, 1998, the transfer was made within ninety days of the filing of the petition.

While Mortgage 3 was executed by Debtors on May 18, prior to the bankruptcy, it was not recorded until June 3, 1998, more than ten days after execution, and after Debtors filed their bankruptcy petition. Mortgage 3 does not constitute a transfer of an interest in Debtors' property during the 90 days before the bankruptcy.[10]

2. Insolvency

A transfer is avoidable as a preference only when made by an insolvent debtor. 11 U.S.C. § 547(b)(3). Under Section 101(32), a debtor is insolvent when "the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of property transferred . . . and property that may be exempted . . . ." 11 U.S.C. § 101(32)(A). Defendant alleges there is no proof Debtors were insolvent at the relevant dates they dealt with Defendant.

Plaintiff relies upon Debtors' bankruptcy schedules as evidence of Debtors' insolvency on the date of the various transfers. In addition, for

---

[10] Of course, the Court has already deemed Mortgage 3 avoidable by Plaintiff under Section 544(a)(3), *supra*. The recording of the mortgage to perfect Defendant's lien after bankruptcy is also likely void as a violation of the automatic stay under Section 362(a). *See infra*. Finally, while not discussed in this decision, Mortgage 3 may also be vulnerable to avoidance as an unauthorized postpetition transfer under Section 549(a).

preference avoidance purposes "the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition." 11 U.S.C. § 547(f). This presumption requires the transferee offer evidence sufficient to rebut the presumption, although the burden of proof still remains with the trustee.[11] "A creditor wishing to overcome the presumption of insolvency must provide the court with 'evidence sufficient to cast into doubt the statutory presumption of insolvency . . . .'" *Pioneer Technology Inc. v. Eastwood (In re Pioneer Technology)*, 107 B.R. 698, 701 (9th Cir. B.A.P. 1988) (quoting *In re World Financial Services Center, Inc.*, 78 B.R. 239, 241 (9th Cir. B.A.P. 1987)).

Defendant has not presented the Court with evidence sufficient to rebut the presumption of insolvency. From a review of the Debtors' bankruptcy schedules detailing their assets and debts, it appears they were insolvent during the preference period. In addition, the statutory presumption alone satisfies this

---

[11] Rule 301 of the Federal Rules of Evidence provides:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

element. The Court concludes Debtors were insolvent during the preference period for purposes of the Section 547 analysis.

3. Antecedent Debt

Defendant argues the Deed of Trust does not constitute a transfer made by Debtors on account of an "antecedent debt," a term not defined by the Bankruptcy Code. Courts have generally held that whether a transfer is made for antecedent debt depends on when the debt was incurred. *National Motor Freight Traffic Association, Inc. v. Superior Fast Freight, Inc. (Superior Fast Freight, Inc.)*, 202 B.R. 485, 488 (9th Cir. B.A.P. 1996) (citing *In re Pan Trading Corp.*, 125 B.R. 869, 875 (Bankr. S.D. N.Y. 1991)). A debt is antecedent if it is incurred before the transfer in question. 5 *Collier on Bankruptcy*, ¶ 547.03[4] (Matthew Bender 15th Ed. Revised 2000); *see also, Henderson v. Allred (In re Western World Funding, Inc.)*, 54 B.R. 470, 476 (Bankr. D. Nevada 1985) (any preexisting debt is considered antecedent). A debt is considered incurred when a debtor becomes legally obligated to pay. *Nolden v. Van Dyke Seed Company, Inc. (In re Gold Coast Seed Company)*, 751 F.2d 1118, 1119 (9th Cir. 1985).

Here, Debtors signed Note 3 on April 1, 1998, and on that date became obligated to pay Defendant $163,282.88 in principal plus interest. This is the same date Debtors signed the Deed of Trust. However, Plaintiff reminds

the Court that the bulk of the proceeds of Note 3 were used to satisfy the balance due from Debtors to Defendant on Note 1 and Note 2. Because no significant new monies were loaned as part of the Note 3 transaction, Plaintiff claims that, in effect, the Deed of Trust was granted to secure a preexisting or "antecedent" indebtedness.

Defendant concedes the bulk of Note 3 was used to refinance the existing obligations from Note 1 and Note 2. To the extent the new loan was simply a "refinance" and the proceeds used to satisfy the previous loans, Note 3 was simply substituted for the prior, antecedent debts, and the transfer effected by the Deed of Trust to secure Note 3 was therefore on account of antecedent debt for purposes of Section 547(b). However, Defendant asserts at least $1,000 and other unspecified consideration was given as new value in the transaction. Whether Note 3 was intended as a "new" loan, or simply as a substitution of a new note for the old debts is unclear on this record. In other words, there exists an issue of material fact as to whether the entire transfer effected by the Deed of Trust was on account of antecedent debt.

In addition, a statutory exception to preference avoidance protects transfers to the extent that, such transfer was intended by the parties to be a contemporaneous exchange for new value, and was in fact substantially

contemporaneous. 11 U.S.C. § 547(c)(1).[12] Whether the transfer of the Deed of Trust was, at least in part, based upon the Defendant's provision of some "new value" to Debtors, or whether the transaction qualifies as a contemporaneous exchange for the exception to avoidance to apply, implicate questions of unresolved fact. These issues can only be resolved at trial.[13]

4. Greater Amount Test

Under Section 547(b)(5), the Court must compare the amount of the transfer to be avoided with the amount the creditor would have received in a hypothetical Chapter 7 liquidation had the transfer not occurred. *Elliott v. Frontier Properties (In re Lewis Shurtleff, Inc.)*, 778 F.2d 1416, 1423 (9th Cir. 1985); *Rakozy v. American Forms & Labels, Inc. (In re Sawtooth Enterprises,*

---

[12] Section 547(a)(2) provides that "'new value' means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation." 11 U.S.C. § 547(a)(2). The new value exception is only analyzed if it first appears an otherwise avoidable preference exists and Defendant, as the transferee, has the burden of proving that the exception applies. 11 U.S.C. § 547(g). However, in this case, whether the Deed of Trust transfer from Debtors to Defendant was on account of antecedent debt and, if so, whether new value was given by Defendant to Debtors, or whether a contemporaneous exchange was intended and occurred, are all issues that appear intertwined in this case.

[13] Defendant also alleges it is protected because the transfer was made by Debtors "in the ordinary course of business." *See* 11 U.S.C. § 547(c)(4). The Court doubts Defendant can prove the statutory elements of this defense, but this is another matter that must await trial.

Inc.), 99.4 I.B.C.R. 171, 172 (Bankr. D. Idaho 1999). A transfer by a debtor to a fully secured creditor is not, by definition, a preference. *Alvarado v. Walsh (In re LCO Enterprises)*, 12 F.3d 938, 941 (9th Cir. 1993). As a result, the Court must focus its analysis on the secured/unsecured status of the transferee creditor.

Here, Plaintiff asserts the value of the property is not more than $160,000 and that Defendant, owed approximately $165,848.83, is only a partially secured creditor. However, the record lacks sufficient facts to determine this issue. It is unclear whether the $160,000 value includes both Section 24 and Section 26 or some other security. Thus, this issue must be preserved for trial.

In summary, genuine issues of material fact exist as to whether a preference occurred, and if it did, whether the new value exception of Section 547(c)(4) applies to the facts of this case, and whether Defendant received more than it would have in a hypothetical liquidation of Debtors' assets. Therefore, neither party is entitled to judgment as a matter of law on this claim.

D. Postpetition Recording

As stated above, "any act to create, perfect, or enforce any lien against property of the estate" is prohibited by the automatic stay. 11 U.S.C. § 362(a)(4). However, there are exceptions to this general rule. Under Section

362(b)(3), the automatic stay does not prohibit the perfection of an interest in property if such perfection occurs within ten days as provided by Section 547(e)(2)(A). 11 U.S.C. §§ 362(b)(3), 547(e)(2)(A).

In this case, Mortgage 3 was executed on May 18, 1998, but not recorded until June 3, 1998. Because the mortgage was not recorded within ten days, the exception in Section 362(b)(3) does not apply. Therefore, recording the mortgage was an act in violation of the automatic stay, and is void. *Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 571 (9th Cir. 1992) (acts in violation of the automatic stay are void, not merely voidable).

Plaintiff also argues Section 549(a) permits avoidance of the recording of Mortgage 3 as a postpetition transfer of estate property. 11 U.S.C. § 549(a)(1). Section 549 "applies to transfers of property which are not voided by the stay." *Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 574 (9th Cir. 1992). Thus, it appears Section 549 does not apply here. In addition, this section is a protection for creditors and generally applies only when the debtor initiates a sale or transfer of estate property. *Zimmerman v. Jim's Lumber & Building Supply, Inc. (In re Ross)*, 96.2 I.B.C.R. 75, 76 (Bankr. D. Idaho 1996) (citing *Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 573 (9th Cir. 1992)). Here, the act constituting the "transfer" was Defendant's late recording

of Mortgage 3, and not Debtors' execution of the mortgage. This is another reason that Court doubts Section 549 could be used by Plaintiff under these facts to cancel Mortgage 3.

Finally, Defendant also claims it received Mortgage 3 as "a good faith purchaser without knowledge of the commencement of the [bankruptcy] case and for present fair equivalent value . . . ." 11 U.S.C. § 549(c). Clearly, whether Defendant can qualify for the protections provided by Section 549(c) is also an issue for trial.

V. Conclusion

On this record, and for the reasons stated above, the Court reaches the following conclusions.

The Satisfactions of Mortgages and Deed of Reconveyance executed by Defendant are not void as a matter of law under Section 362 of the Bankruptcy Code. If Defendant is shown to have intended to release the lien interests created by Mortgage 1 and Mortgage 2 and the Deed of Trust, the satisfaction and reconveyance will be valid and enforceable by Plaintiff.

Under Section 544(a)(3), Plaintiff may avoid Defendant's lien interest in Section 26 under the Deed of Trust and Mortgage 3 because both

instruments contain an erroneous legal description. The description of Section 24 under the Deed of Trust and Mortgage 3 is sufficient. Also under Section 544(a)(3), Plaintiff may avoid Defendant's interest under Mortgage 3 in its entirety because it was not properly perfected on the date of bankruptcy.

Under Section 547(b), the Court concludes as a matter of law that the transfer made by Debtors to Defendant under the Deed of Trust occurred within ninety days of bankruptcy and at a time Debtors were insolvent. The issues of whether this transfer was made by Debtors to Defendant on account of antecedent debt, whether the transfer is excepted from avoidance, and whether Defendant received a greater amount because of the transfer than it would have received in a hypothetical Chapter 7 case, are all issues that must be resolved at trial.

Finally, the recording of Mortgage 3, which occurred after the filing of Debtors' bankruptcy petition, was done in violation of the automatic stay, and is therefore void under Section 362. Plaintiff likely could not use Section 549(a) to attack Mortgage 3 under the facts of this case.

Defendant's Motion for Judgment on the Pleadings should be denied. The Court will enter an appropriate separate order.

DATED This 18th day of May, 2000.

_____
JIM D. PAPPAS
CHIEF U.S. BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true copy of the document to which this certificate is attached, to the following named person(s) at the following address(es), on the date shown below:

Office of the U.S. Trustee
P. O. Box 110
Boise, Idaho 83701

Craig Christensen, Esq.
P.O. Box 130
Pocatello, Idaho 83204

Bart Davis, Esq.
P. O. Box 50660
Idaho Falls, Idaho 83405

Charles Johnson, Esq.
P. O. Box 1725
Pocatello, Idaho 83204

ADV. NO.: 99-6016

CAMERON S. BURKE, CLERK
U.S. BANKRUPTCY COURT

DATED: May 18th , 2000

By_____
Deputy Clerk